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Haldar, Piyel (2016) Equity as a question of decorum and manners: conscience as vision. *Polemos* 10 (2), pp. 311-327. ISSN 2035-5262.

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or alternatively

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## Equity as a question of decorum and manners: Conscience as vision

**Abstract:** please provide a short abstract of the article

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### 1. The problem stated

If, historically and philosophically, equity was regarded as being consumed by arbitrary measure it was because the principle of conscience was seen to pervade the decision making powers of the judge. Judgments surrendered themselves to sophistry and the substantive jurisprudence of the Chancery courts came to be regarded as equivalent to religious casuistry. Equity, to paraphrase John Selden, was to law what spirit was to religion; “what everyone pleases to make it.”<sup>2</sup> The argument is, of course, familiar. Conscience was an excuse either for Chancellors to exercise their individual whim, or to justify the pleasure of Crown intervention into, and at the expense of, common law. Part of the problem, however, is that standard historical accounts of equity and its co-relative concepts such as conscience and fiduciary-ship are largely the legacy of post Kantian historiography. As such, over-emphasis is given to the idea of conscience as springing from the interiority of the individual rather than belonging to public discourse, office or institutional life. For the Kantian, conscience lies within the moral individual and so assumes that the danger of equity is that the decision making process is one that is undertaken within the limits of mortal life and by an individual persona. For Kant, in particular, this is what renders courts of equity so ineffectual. In his words, equity is a “dumb goddess” since questions of right ought to be taken before a civil court (*forum soli*) and not a court of conscience (*forum poli*).<sup>3</sup>

This is not to suggest that criticism of Equity’s reliance upon the vague unprovable notion of conscience did not exist prior to Kant. It formed the basis of every charge of monarchical intervention into the law. Equity was the way out of law, sidestepping statute and riding roughshod over common lawyers. Nevertheless, limiting our attention to the circumstances of these criticisms (the fight between Chancellor and common lawyers, between Ellesmere and Coke, between King and law) conceals within history a more nuanced theory of conscience based on a theology of the dignity and decorum of office. Such criticisms of equity, particularly during the early modern period, have to be subjected to more rigorous appreciation since what was being criticised was not so much conscience in and of itself but rather the manner in which conscience escapes its proper place as a matter of the proper conduct of office. Take as an initial

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<sup>1</sup> A debt of gratitude is owed to the participants of Equity and the Resources of Critique Workshop June 29 – 30 2015. The workshop organised by Nick Piška enabled a number of academics in the field to open up a debate in which equity might surrender to rigorous interrogation from a range of critical perspectives. I particularly appreciated comments and papers by Nick Piška, Jose Bellido, Riccardo Baldissone, Fernanda Farina, Geoffrey Samuel, Adam Gearey, Robert Herian, Sarah Wilson, Sidia Fiorato, and Anne Bottomley. Given the range of perspectives I cannot hope immediately to accommodate all the suggestions levelled at my own paper without some degree of theoretical violence and a greater degree of reflection than I am capable. Nevertheless, all the suggestions made have been entirely helpful and for those I am grateful.

<sup>2</sup> John Selden, *Table Talk*, [1689] (London: Cassell, 1887), 62.

<sup>3</sup> Immanuel Kant, *Groundwork for the Metaphysics of Morals*, ed. Christine Korsgaard, (Cambridge: Cambridge University Press, 2012), 18. See also the discussion at 390.

example Lord Nottingham's often cited dictum that: "with such a conscience as is only *naturalis et interna* this Court has nothing to do." Lord Nottingham's tenure as Lord Chancellor, of course, was marked by his project to systematise the rules of equity. But even for as radical a systematiser as Lord Nottingham, conscience was not to be eradicated from the judicial function of Chancery judges. Rather, it was to be more stridently aligned to a different, more secular and civic orientated function. Hence, as he continues; "the conscience by which I am to proceed is merely *civilis et politica* and tied to certain measures."<sup>4</sup> Here the term "measure" might be read at different levels. Conscience might be that which, as it existed within the civil and political domain, was subject to proof and proper calibration. It might be that Nottingham advocated only a proportionate and careful use of the term conscience. Or, it may be that conscience was to be tied to whatever certain measures a political community might need to take in order to fulfil a desired objective. Whatever the case, in using a term with mathematical and arithmetical overtones, Nottingham was not, as is sometimes claimed, diluting equity, making it more like common law. Indeed, his sentiments are not so far removed from the Aristotelian idea of equity which was also framed as a problem of measure. Just as the ancient Lesbian architects developed the lead square to measure crooked and misshapen stones, so equity measures irregularities. To embed conscience in the civil and political sphere, as opposed to the natural and internal domain of man, does not undo the jurisdiction of equity.

The starting point for this discussion is that modern historiography collapses a distinction that ought properly to distinguish between two anthropological categories. The first category might briefly be described as that of the moral individual persona. It refers not simply to the temporary and limited life of a physical body but also to its place within the social order. It covers the realm of social actions, of the roles, characters and masks that are properly attributed to personae. Here, conscience is considered to be a natural condition of man, his *status naturalis*. It is inscribed at the heart of self-identity and speaks through the mask of persona. Each unified being, or empirical unit, is assumed, either by lawyers or by philosophers, to be the source of conscience. This is not to say that conscience is treated simply as subjective opinion, but it is individuated. For early modern jurists such as Christopher St Germain, conscionable conduct was that which enabled a person to translate the rules of natural law into specific forms of conduct. While not subjective, conscience required a process of "Sinderesis." Synderesis (in its modern spelling) describes the mental habitus or disposition towards practical reason. In its early modern form, the term was elaborated both by theologians and by jurists. It was the spark of conscience (*scintilla conscientiae*) given to and shared by each individual rational creature. For St Germain, synderesis was innate "motive force" and proceeded through an intuitive knowledge of good and evil. In his words, "Sinderesis is a naturall power of the soul, set in the highest part thereof, moving and styringe it to good and abhorring evil. And this sinderesis Our Lord put in man, to the intent that the order of things should be observed."<sup>5</sup> It was at this level that conscience came to be attributed to the actions and moral understanding of social personae such as defendants or fiduciaries and consequently ascribed to those whose social personae are transformed into office based functions (such as those of Chancery judges). Historians of equity, such as Mike Macnair, suggest that conscience was private knowledge and that Chancery initially developed its jurisdiction from the ability of judges to use private knowledge/conscience of facts that were unprovable at common law.<sup>6</sup> Such an argument, however, runs the risk of attenuating

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<sup>4</sup> Lord Nottingham, *Cooke v Fountain* 3 Swanst. Cited in Mike Macnair, "Equity and Conscience" *Oxford Journal of Legal Studies*, 27:4 (2007): 659-681, 680. See also the discussion in Dennis Klinck, "Lord Nottingham and Conscience" in *Journal for the History of Ideas* 67, 1 (2006): 123-147. Klinck also notes a distinction in Nottingham's words between private and public conscience.

<sup>5</sup> Christopher St. Germain, *Doctor and Student* [1524], eds. T.F. Plunknett and J.L. Barton (London: Selden Society, 1974), 85. For Further discussions of synderesis see Gary Watt, *Equity Stirring* (Oxford: Hart, 2009), 213. Dennis Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Farnham: Ashgate, 2013), 54

<sup>6</sup> Macnair, "Equity and Conscience."

the manner in which the functions of office were characterised by its own conscience based protocols.

Consequently, the second anthropological category, that of official personae, refers to conscience as a structural feature of the continuing life of office and the metaphysical character of dignity. This category covers the variety of offices relevant to equity. Most obviously it covers the offices of judge and Chancellor, but, arguably, in so far as they might also carry a set of official duties and liabilities, it might extend to those of trustee and fiduciary. According to Conal Condren, early modern office required more than choosing social personae of suitable qualities (ie values that conform to the Ciceronian values of duty and *honestas*). Social personae, for all their admirable qualities, were fragile units whose troubling individual conscience might clash with what was required as a matter of duty. Social personae assumed the duties of public office by virtue of training, ceremony and oath designed to repress private morality.<sup>7</sup> We might add to this observation by stating that ceremonies of investiture placed the appointee in the pre-existing metaphysical arrangement of office. An office without an incumbent persona might be ineffectual but, as will be argued, it was not conceived as empty space. The category “office” might be defined as a potentiality that required the social persona to accede to it in order for it to be an active agency. What gave this category its potential was a set of parameters and pre-conditions that conformed to the ethical principle of decorum. Like Equity, to which the term decorum was often attached, the concept was both para-legal and corrective. Initially the term was borrowed from Cicero who applied it to notions of duty (*officiis*) and *honestas*. It was adapted to the idea of official dignity of good conscience and judicial personality.<sup>8</sup> As a consequence, the decorum of office requires appreciating a different model of understanding issues and my argument towards the end of this article will be that the real revolution during the renaissance involved a tilting towards visual and imaginative forms of addressing issues of equity.

Much of what follows in this article is an attempt to direct an understanding of conscience away from the register of individual conscience and towards an understanding institutional office. Such an understanding requires a more rigorous account of decorum required in the public functioning of office. The aim is to recuperate and return to equity the category of conscience as a matter of public duty, dignity and decorum. The aim is not to reconstruct a history of judicial practices but to synthesise from a range of sources a theory of equitable decorum. It is from within the history of equity itself that a range of terms and practices might be retrieved and rehabilitated. As a result a certain amount of context is required in order to trace the evolution of the legal philosophy of decorum and its relationship to equity. While this article ventures to return to equity questions of office and decorum, it also attempts to extend the model of decorum to a range of other non-judicial personae to which the traditional question of conscience attaches. A concluding section proposes that social personae habitually asked to defend their positions in equity, personae such as trustees and fiduciaries, might also be classed as holding office, and might also be conceived in terms of a more rigorous decorum based understanding of conscience.

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<sup>7</sup> Conal Condren, *Argument and Authority in Early Modern England; the Presupposition of Oaths* (Cambridge: Cambridge University Press, 2006). See also, Shaun McVeigh, “Afterword: Office and the Conduct of the Minor Jurisprudent,” *University College Irvine Law Review* 5.1. [2015], 499. See also Ian Hunter, “The Man and the Citizen; the Pluralization of Civil Personae in Early Modern German Natural Law” in *State, Security and Subject Formation*, eds. Anna Yeatman and Magdalena Zolkos (London: Continuum, 2010): 36-49. Gary Wickham and Barbara Evers, “Society, State, Security and Subject Formation; The Emergence of Modern Neutrality Society and the Formation of Types of Subjects it Requires,” in *State, Security and Subject Formation*: 116-132.

<sup>8</sup> In this sense I depart from both Ian Hunter and Barbara Evers, who situate decorum in the works of Thomasius as a means of secularizing civil society. See Ian Hunter, *The Secularization of the Confessional State; The Political Thought of Christian Thomasius* (Cambridge: Cambridge University Press, 2007) and Barbara Evers “Thomasius’s ‘decorum’ and Elias’s manners,” in *Challenging Identities, Institutions and Communities*, ed. B. West (Adelaide: University of South Australia and The Australian Sociological Association, 2014).

## 2. Classical equity and decorum

What makes decorum an appropriate concept to return to is that, throughout the history of the idea, it has had strong associations with various permutations of equity, conscience and office. Decorum, for all its modern connotations, is not anathema to equity. As a principle of classical rhetoric, decorum prescribed the suitability of speech to time, opportunity, genre and audience.<sup>9</sup> It required the orator to vary his temper and style to different occasions. For Aristotle in particular, speech could not conform to a uniformity of rigorous precepts. It had to be “proportional to the subject” and had to surrender to necessary variation.<sup>10</sup> It had to suit and fit a variety of circumstances. Decorum was, in short, a corrective principle ameliorating the other rules of rhetoric.

The association between decorum and equity became more pronounced in the field of ethics. Here decorum, while not losing its rhetorical relationship to aptness, seemliness and propriety, assigned a correct method to the discovery of ethical norms. It was a pre-requisite that enabled an orator, a lawyer, a philosopher, or any other office holder, to develop a particular disposition towards, for example, good order, tact, piety, reverence, temperance or courage. Moreover such a disposition meant avoiding the idea that rules of conduct applied uniformly across all cases. Rather, it allowed an individual to vary behaviour according to universal (as opposed to general) and ethical principles. In this sense, Aristotle’s image of the soft leaden ruler used by the builders of Lesbos to measure stones, often used as a metaphor of equity, also encapsulates the principle of decorum. By being bent into shape and yielding to the property of these stones, the variable rule both corrected abstract arithmetical sizing (based on an average calculus of shape) and gave what was properly due to measurement. Both decorum and equity sought to apply justice in “proportion.” Both sought to fit behaviour, circumstances and particulars and in doing so, both were regarded as processes of correcting rigorous and generalised rules.

The relationship between the ethics of decorum and equity is taken up more systematically as a question of office by the Roman orator and philosopher Cicero. In *On Duties*, (or, *Of Offices* as the title *de officiis* used to be titled) the concept decorum connected the general, non-technical sense of equity as public *aequitas* (that is equity in the sense of equality and fairness) to the technical sense of equity as that which ameliorated law. Decorum held all citizens, higher and lower classes, in an equality of right. It corrected the situation where a population of different kinds came together with nothing to bond them except the tragic fate that the greatest justice yield the greatest harm (*summum ius summum iniuria*).<sup>11</sup> It placed the office holder in the position of discovering the ethical norms folded within the natural world, the immutable force inherent in the universality of things, and the legacy of custom found in the *mos maiorum* of our ancestors. It is in this sense that decorum might be situated within the technical sense of equity since it also involved the ability to distinguish universal law from civil law. For Cicero, in appealing to higher values, decorum modified the limits reached by the detached mind of the civil legislator and it rectified a law preserved by rigorous definitions and exclusions.

Both Aristotelian and Ciceronian features of decorum were taken up by renaissance humanists (poets as well as lawyers, artists as well as jurists). Nevertheless, it is important to stress a further aspect expounded by Cicero since he connects decorum not simply to equity but to the principle of conscience. This he does through the principle of *honestas*. Here Cicero refers the category of decorum to the temperance and ethical virtue displayed by the man of honour (*honestas*). The term *honestas*, it ought to be noted, signifies more than mere honesty or integrity. As a feature of decorum, *honestas* required of one placed under duty and conscience to look

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<sup>9</sup> Horace, “*Ars Poetica*” in *The Epistle* (Oxford: Oxford University Press, 2015); Aristotle, *Poetics*, trans. Stephen Halliwell (Oxford: Loeb 1995)

<sup>10</sup> Aristotle, *The Art of Rhetoric*, trans. J.H. Freese (Oxford: Loeb, 1981) 3.7.

<sup>11</sup> Cicero, *On Duties*, eds. M.T. Griffin and E.M. Atkins (Cambridge: Cambridge University Press, 1991), i.ix.33.

among the living forms of nature and to copy those forms. The mind, that is to say conscience, had to become a hunter of forms (*venator formarum*). It sought and *looked* for “beauty, loveliness and the congruence of parts of the things that *sight* perceives.”<sup>12</sup> Decorum was found in nature and so ethical norms were those copied from the lessons offered by the laws of nature. It was nature that provided the model of decorum that shaped the office holder.

It is important to stress that for Cicero conscience lay not necessarily in office. But neither was it a private matter. Conscience was rather constitutive of social persona who by virtue of this *honestas* acted in concordance with the spiritual principles of decorum. This, as we shall argue in the following section, stands in sharp contrast to the renaissance re-articulation of decorum as a matter of office. Irrespective of this, the basic features of classical rhetoric and ethics which lock together decorum, equity, conscience and the appeal to a higher law (or the law of nature) are revived during the renaissance.

### 3. Renaissance equity and decorum

The concept “decorum” was revived and became central to the Renaissance humanist. At a general level, it provided the conditions of service and ceremony within which eloquence and the perorations of dignitaries and other officials were able to take place. Admittedly its dictates applied across a much broader spectrum than law and equity but they were not wholly without relevance to matters of Chancery. Erasmus, for instance, employed the term in reference both to the private cultivation of manners as well as to the function, behaviour and perorations of dignitaries.<sup>13</sup> Perhaps more famously, the Italian humanist Baldassarre Castiglione stressed decorum in terms of the outward appearance of the courtesan. Close attention (at once lavish and understated) must be paid to one’s appearance. Rules must be observed regarding etiquette in matters of dress, conversation, grace, bodily comportment. This was decorum as *sprezzatura*.<sup>14</sup> Such rules were not unconnected to questions of judicial office since, as Norbert Elias has shown, the norms of the civilizing process were locked into the broader interests of state formation and the evolution of state apparatuses.<sup>15</sup> More directly relevant, however, was the importance of decorum in the tradition of early modern poetics which can be traced through a number of manuals on rhetoric and *poesis*. This latter use is not unrelated to the development of equitable functions of office since *poesis* required a sense of style, the judgement of subtle differences and above all, a sense of spiritual vision. These broader uses of the term operate in the background of legal humanism and I shall turn to the congruence of poetic vision and equity later.

Among the humanists with a more direct interest in matters of law (whether civil law, common law or Chancery), decorum held a more technical set of functions. At one level, it informed the development of a more conscientious approach to questions of fact. Take for example the exposure by the early fifteenth century humanist Lorenzo Valla of the falsification of the Donations of Constantine.<sup>16</sup> Documents purportedly written by Constantine I had for centuries been assumed to have granted dominion over the Western Roman Empire to the papacy (as reward for Pope Sylvester’s miraculous powers in curing Constantine of leprosy). The authenticity of these documents was on the assumption that they would have been written in the fourth century. Valla’s revelation of their forgery rested on his philological methods, his knowledge of Latin and

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<sup>12</sup> Cicero, *On Duties*, i.iv.33.

<sup>13</sup> Desiderius Erasmus, *Proverbs Chiefly taken from the Adages of Erasmus* (London: T.Egerton, 1814) i.ii.15

<sup>14</sup> Baldassarre Castiglione, *The Book of the Courtesan* (London: Doubleday, 1959)

<sup>15</sup> Norbert Elias, *The Civilizing Process Vol 1; The History of Manners* (Oxford: Blackwell, 1969). Norbert Elias, *The Civilizing Process Vol 2; State Formation and Civilization* (Oxford: Blackwell, 1982).

<sup>16</sup> Lorenzo Valla, *On the Donations of Constantine* (1440), trans. G.W. Bowersock (Cambridge MA: Harvard University Press, 2008).

his reconstruction of historical facts. Concluding that the language used in the documents could not have been used by Constantine, but could only have been written some four hundred years later, Valla's argument combined historical knowledge with decorum. Historical reconstruction, in other words, had to take account of what was proper to a period, to its style and habits. Decorum required a technique born of philology and other branches of the *studia humanitas*.

While Valla stressed a particularly scholarly notion of decorum, others applied more casuistic reasoning. The 16<sup>th</sup> century Italian jurist and humanist Andreas Alciato criticized Valla's philology. For Alciato, decorum meant subjecting historical fact to common opinions and to contemporary (rather than historical) claims to legitimate dominion. Exposure of forgery made through mere historical and philological reconstruction could solve legal claims. This is why throughout his *Praetermissa*, and in his Bologna orations, Alciato heavily criticised humanists for their own lack of decorum in being unconcerned with questions of law and justice. For him, decorum was a paralegal concept that best suited to lawyers in establishing justice beyond the law.<sup>17</sup>

The debate between Valla and Alciato highlights the variability of the term "decorum" and this variability is what was taken up by equity lawyers. Its most famous articulation occurs in the first book of Thomas More's *Utopia*. Strict applications of the law, More reminds his readers, "count all offences equal so that there is no difference between killing a man and robbing him of a coin when, if equity has any meaning, there is no similarity or connection between the two cases"<sup>18</sup> Equity had to adapt and this for More was a matter of decorum. It is decorum that allowed the lawyer, as well as the orator or the courtesan, to adapt to different circumstances and occasions "as if it were a rule of soft lead."<sup>19</sup> Decorum became a criteria for judging, for treating cases "tactfully."

More's decorum might seem identical to Aristotelian and Ciceronian versions of the same concept. It is decisive, however, that his comments are directed away from the "sentiments of the heart" and towards a range of customs and offices within the republic of utopia filled by councillors, philosophers, and monarchs all of whom took the lead from the office of Christ. The revival of the principle of decorum, in other words, was turned away from social persona (the Ciceronian man of virtue) and towards the question of office. The term came to replace the medieval concept of dignity so well covered by Ernst Kantorowicz as the continuing form of life that exceeded the life of any mortal incumbent of office (*dignitas non moritur*).<sup>20</sup> In a consilia by the jurist Baldus, dignity was discussed in anthropomorphic terms of an intellectual and public person that turned the mind of a private office holder to action.<sup>21</sup> A holder of office, in other words, was an instrument of dignity (*instrumentum dignitatis*). No doubt it was from the language of dignity that the renaissance humanist came to filter their revival of Ciceronian decorum. Just as the King was styled the "finger of God," so too the judge would become the *digitus dignitatis*, the animate instrument of decorum. The supra-individual and perpetual character of office is what was to determine the actions of judicial office and modify the application of justice.<sup>22</sup> All

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<sup>17</sup> Andreas Alciato, "Praetermissa" [1518] in *Opera Omnia* (Basle, 1557), 4.1. Andreas Alciato, Bologna Oration [1546] *Opera Omnia* (Basle, 1557), 3.1

<sup>18</sup> Thomas More, *Utopia*, ed. Edward Surtz (London: Yale University Press, 1964), 29.

<sup>19</sup> Thomas More, *Utopia*, 51.

<sup>20</sup> Ernst Kantorowicz, *The King's Two Bodies; A Study in Medieval Political Theology* (Harvard: Harvard University Press, 1957). It ought to be remembered that for Cicero decorum was always related to dignity. It causes the audience to love him and wins faith. See Cicero, *On Duties*, i.ii.32-33. It is this aspect of dignity that added further licence for the Humanist to assimilate the category of decorum into their own understanding of office.

<sup>21</sup> Ernst Kantorowicz, *The King's Two Bodies*, 445.

<sup>22</sup> That the renaissance office was conducted according to the norms of civic virtue is a point already well made by a number of historians such as Quentin Skinner. Skinner's magisterial essay on Ambrogio Lorenzetti's frescoes of good and bad government gives emphasis to the use of emblematic metaphors extant with fourteenth century Italian republic states. Incumbent office holders were 'tied' and 'bound' to conduct their roles in a perfectly virtuous manner. Such metaphors of binding are portrayed by Lorenzetti in the form of a rope hanging down from the hands of *iustitia* linking her to public officials. Quentin Skinner, "Ambrogio Lorenzetti and the Portrayal of Virtuous Government" in *Visions of Politics, vol2: Renaissance Virtues* (Cambridge 2002): 39-117, 67.

the virtues and ethical values established in the Ciceronian philosophy of decorum came to be regarded as pre-existing norms that came with the omni-temporal dignity of office. An appointed social persona merely had to succumb to these precepts in order to take up his position. In terms of equity, and the specific role of the Chancellor, the principle of decorum turned equity and its corresponding element of conscience into more than a question of conduct, of manners, or of protocols. In shaping the understanding of offices it determined the persona of the Chancellor/judge as one who simply activated an already existing and inherent potential. The Chancellor, for example, was keeper of King's omni-temporal conscience; he was the secretary of a mystical and timeless integrity that the King kept secreted in office. Conscience pre-existed his incumbency. As such, conscience was, and has to be, understood in terms of a public and political theology of office. What was required in the exercise of conscience was not a question of imprecise individual choice but of strict external conduct. He had to conform to strident habit and comportment. For some renaissance lawyers, such as Christopher St. Germain, "the lorde Chauncellor must ordre his conscience after the rewles and groundes of the lawe of the realme."<sup>23</sup> Within this scheme, the persona of a judge or fiduciary was simply an incumbent that filled a role determined by a metaphysics of decorum in order to activate it.

The reach of the metaphysical properties of office extended to and determined the epistemological capacities of those who inhabit them so that, at one level, decorum referred to an ability to appreciate questions of fact that could not be proven otherwise by documents or depositions that ordinarily were admitted to the common law courts.<sup>24</sup> Seen in these terms, it might be possible to re-situate those early modern debates about whether Chancery was a court relying upon the private conscience of the Chancellor or a court that was forced to renounce conscience in favour of the law. The decorum of office meant the disavowal of all those qualities of personal attributes and intellectual egotism but that did not mean that conscience disappeared. Even Christopher St Germain, who in *The Little Treatise concerning Writs of Subpoena*, had argued that the Chancellor might raise conscientious objections to the application of rules based on private knowledge concedes the limits of private conscience in his *Addicions of Salem and Bizance*. The point is expressed by both Jerusalem and Byzantium. For Salem truth "ruleth the [private] conscience whatsoever the order of the law be." But rather than submit to this private knowledge, the judge must rather resign his office. For Bizance, the judge must simply remove private knowledge from his sphere of understanding.<sup>25</sup>

A further example might be noted since it appears where it is least expected. It is to be noted in the very criticism of Chancellorship made by John Selden. Selden's famous claim, often cited in support of arguments against conscience and as evidence of Selden's staunch opposition to Crown prerogative, was that equity varies according to the length of the Chancellor's foot. What is important to bear in mind was that for Selden, the problem of conscience was not simply one of vagueness or arbitrariness. It was rather a problem in which the intellectual egotism that lay outside of the office of a judge and solely within the realm of his individual instinct and sentiment triumphed over public duty.

Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience.<sup>26</sup>

<sup>23</sup> St. Germain, *Doctor and Student* [1524], 105.

<sup>24</sup> See generally, Macnair, "Equity and Conscience."

<sup>25</sup> Christopher St. Germain, *Addicions of Salem and Bizance* (London, 1534) fols 43v-44v cited in Philip Hamburger *Law and Judicial Duty* (Harvard: Harvard University Press, 2008), 120-21. See also David Saunders, *Anti-Lawyers; Religion and the Critics of the State* (London: Routledge, 1997), 24.

<sup>26</sup> Selden, *Table Talk*, 62,63.



The point to note is that for Selden equity is “roguish” when conscience belongs not to the sacral duties of the Chancellor, but is linked to his physical body. It is his foot that refuses to toe the line. Nothing is stated about his seat or office. Conscience, in other words, only becomes a fallacious form of argumentation (as the logicians would argue) because it becomes an entirely private function of an empirical individual. In terms borrowed from Ernst Kantorowicz, we might say that Selden’s observations are not about the *corpus mysticum*, the *corpus dignitas*, or the continuing life of chancellorship. His concerns are rather with theft of the principle conscience by the *corpus physicum* or by the individual. And this is what makes conscience an arbitrary measure “against the law.” Conscience has slipped its moorings. Indeed in the paragraph following his podal metaphor, Selden states that conscience is not anathema to judicial functions in so far as it is something based on public understanding and agreement: “If [a] prisoner should ask [a] judge whether he would be content to be hanged were he in his case, he [the judge] would answer, ‘No.’ Then says the prisoner ‘Do as you would be done to.’” This dialogue however takes place between two private individuals and, as such, “Neither of them must do as private men, but the judge must do by him as they have publicly agreed.”<sup>27</sup>

To stress, ridding private knowledge from the sphere of equity was not the equivalent of ridding the court of the principle of conscience. Public duty involved a disavowal of private knowledge and morals even if those private morals conformed to good conscience and *honestas*. But such a disavowal simply meant that the principles of *honestas* and conscience lay elsewhere in the structural domain of office. It was within the fact of office itself that conscience lay and this was irrespective of the persona who only happened to occupy that office. Put differently, public office based conscience was built on the sacrifice of private conscience.

#### 4. Equitable conscience as a form of vision

If office became a metaphysical entity imbued with a spirit beyond the law, decorum also imposed upon the incumbent a duty to know that spirit. It is this knowledge that composed the *scientia in conscientia*. It was based not on personal knowledge of facts but on the existence of an impersonal and transcendent spiritual domain. Conscience as it was linked to the metaphysical nature of office did not necessarily seek to establish the interior dimensions of subjectivity, nor to visualise the interior causes of behaviour. What was to be apprehended was not simply the interior conscience of man or the interior causes of behaviour. In fact conscience as a form of knowledge looked outwards from the halls and cloisters of Chancery towards a transcendent reality that held law in thrall. It was the application of this sensibility that connected conscience to the theoretically extra-legal tradition of *poesis*. This tradition, it might be noted, was populated by a number of humanists who were both poets and lawyers.<sup>28</sup> For them, poetic truths were those that illuminated both the interior soul, and, more importantly for our purposes, the spirit of the civic sphere. Truth was concealed glory; it was held *sub corticibus fabularum* and it had to be apprehended beyond the naked fact of mere appearance.<sup>29</sup>

In a similar vein, judicial office had to apprehend the prior causes of law, the *anima legis*, or the life force of the law. Conscience became the conduit that allowed the Chancellor and the judge to mediate between the spirit and the letter of the law (and in this sense, office might be characterised as a media effect).<sup>30</sup> And, just as *poesis* had its capacity for poetic vision so did other

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<sup>27</sup> Selden, *Table Talk*, 63.

<sup>28</sup> Among them were Thomas Wilson, *The Arte of Rhetorique* [1560] (Menston: Scolar Press, 1975); Abraham Fraunce, *The Arcadian Rhetoric* [1588] (Menston: Scolar Press, 1969); George Puttenham, *The Arte of English Poesie* [1588] (London: Qontro Classics, 2010); Henry Peacham, *The Garden of Eloquence* [1593] (Menston: Scolar Press, 1977); Thomas Elyot, *The Booke named the Governor* [1531] (Menston: Scolar Press, 1971).

<sup>29</sup> C.S. Lewis, *Poetry and Prose in the Sixteenth Century* (Oxford: Clarendon 1990), 318

<sup>30</sup> I am grateful to Jose Bellido for pointing this out.

offices within the humanist scheme of things. This capacity to apprehend and then to apply an exterior principle and a universal set of normative ethics was a visual capacity. What was required was a non-ordinary form of vision that did not correspond to what today we might term biological vision or optics. It was a form of imagining or seeing with the mind's eye. This decorum of vision, conscience by another name, was not entirely new to the renaissance revival. As already noted above, Cicero had claimed that the *honestas* was a hunter who copied the forms of life found in nature. In doing so he gave heavy emphasis to the capacity of sight.

No other animal perceives the beauty, the loveliness, and the congruence of the parts of the things that sight perceives. Nature and reason transfer this by analogy to the mind, thinking that beauty, constancy and order should be preserved, and much more so, in one's decisions and in one's deeds.<sup>31</sup>

It was vision that allowed those under duty to perceive the congruence of beauty in nature. Moreover, it was through sight that the decorum of nature transferred onto the deeds of those noble holders of office.<sup>32</sup> The visuality required of Ciceronian decorum was not lost on early modern humanists for whom decorum was conceived as a process of revelation. Conscience required a vision of what could not be ordinarily apprehended. Take Joseph Hall's depiction of the "Good Magistrate" as a fittingly pictorial example of visual decorum. "Displeasure, revenge, recompense, stand on both sides of the bench, but he scorns to turn his eye towards them, looking only right forward at *equity* which stands before him."<sup>33</sup> Ordinary vision in fact is that which has to be disavowed. Just as "on the bench, he is another from himself at home," just as "all private respects of blood alliance and amity are forgotten," so too he judge must be blind to terrestrial concerns. Non-ordinary vision rests on a blindness towards these other surface concerns. Conscience as vision was no easy task. Nature, according to Heraclitus, likes to hide, and so too does equity as the spirit of law. The Truth could not be divulged rashly. For the poets this required a spiritual journey. For the judicial holder of office this required a slightly different, yet analogously noble passage in which the judge, "as public servant of peace and justice" might exercise a "conveyance from the streams of justice" to the court. What was to be apprehended as a matter of conscience was that which preserved and cared for the law. It was that which in Fortesque's terms "rouses the vital spirit of law."<sup>34</sup>

If decorum sought to imagine the spiritual domain that characterised the metaphysical office then a question might be posed as to the specific provenance of this spirit. This, of course, is precisely the question at the heart of the renaissance debates since there were a number of differing provenances of equity. The debates between Thomas More and Christopher St Germain attest to the fraught question of the source of equitable jurisdiction, but other jurists such as Samuel West, and Charles Crompton attest to a wider range of imaginable sources in more spiritual terms.<sup>35</sup> In a sense, these vexed questions might be held in parenthesis in order to

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<sup>31</sup> Cicero, *On duties*, 7.1.14

<sup>32</sup> I have tried to develop these themes in a number of different articles. See Piyel Haldar, "The Tongue and the Eye, Eloquence and Office in Renaissance Emblems" in *Genealogies of Legal Vision*, eds. Peter Goodrich and Valerie Hayaert (New York: Routledge, 2015). Piyel Haldar, "Forensic Representations of Identity: The Imago, the X-ray and the Evidential Image" in *Law and the Humanities*, 7:2 (2013), 129-150.

<sup>33</sup> Joseph Hall, "Characters of Virtues and Vices" [1608] in Joseph Hall, *Works*, ed. Philip Winter (New York: AMS Press, 1969): 89-125

<sup>34</sup> John Fortesque, *De Natura Legis Naturae* [c1463] (New York: Garland, 1980). Thus a law which prohibits its citizens to climb the walls of a city could not apply to someone who climbed those walls to repel the enemy since the observance of the law would only swallow up the law. "Equity fullfills the lawe, it rouses its vital spirit," 24

<sup>35</sup> St. Germain, *Doctor and Student*; Christopher St. Germain, *Treatise Concerning the Division between Temporality and Spirituality* [1533] in Thomas More, *Complete Works of Thomas More*, Vol 9. ed J. Trapp (New Haven: Yale University Press, 1975), 173-212; Christopher St. Germain, *Additions of Salem an Bizance* [1533] in Thomas More, *Complete Works*, Vol 10. eds. John Guy, Clarence Miller and Thomas Keen (New Haven: Yale University Press, 1988); Thomas More, "Debellation of Salem and Bizance" in Thomas More, *Complete Works*, Vol 10; William West, *Symbolography* [1647] (London: Garland, 1979); Richard Crompton, *Authority and Jurisdiction of the Queen's Courts* [1594] (London: W Clarke, 1804).

undertake the task of manufacturing a theory of equitable conduct. What matters is not the specific nature of equity that differs across the range of debates. What is more interesting is that the question of office gives rise to a creative imagination with respect to the provenances of equity. There are many equities.<sup>36</sup> Decorum, the way in which it constituted conscience and *honestas* as a question of manners rather than individual conscience, is what enabled Chancery lawyers of the period to engage with equity at this level in order to envisage the provenance and therefore the measure of equity. It matters little whether that provenance was a theological reconstruction or whether it involved a scaffolding of monarchical intervention within the law or whether it was the semblance of civic republicanism. Any critical or other inquiry into the reform of law ought to attend to the decorum of office in order to envisage the possibilities that might be activated.

## 5. Conclusions: social personae and individual conscience

Decorum, as I hope I have argued, categorises the offices of Chancellor and judge in terms of metaphysics of public rather than private conscience. It is important to remember that, in the early modern period, the visual decorum of office applied not simply to judge-craft but to a broad range of functions and personae. As Conal Condren points out, every social role was embedded in the ethical habitus of office. Judges, jurists, ambassadors, magistrates, secretaries, orators, poets and even “lowly” shepherds were conceived in terms of public duties. The term bestowed decorum both in terms of dignity and duties. But the category also established each office within a broader network of offices that were able to communicate with each other in a shared vocabulary and according to a shared moral economy. Roles could be negotiated, terminology could be transformed and subjected to re-description, (paradiastole).<sup>37</sup> Condren characterises this network of offices in dialogic terms. It would be more accurate to suggest that the ethical habitus of the network was conceived of as a visualization of the public spirit. One office could see another according to what Peter Goodrich has, in a slightly different context and borrowing from Sir Edward Coke, termed visual lines of communication. It is not inconceivable to suggest that both common law and equity, incommensurable in other respects, were bound by the visual protocols of decorum. Both were able to view each other in terms of a grander vision of the public sphere.

The point here, and it is a point that has to be made in conclusion since it requires further research, is whether the office of an equitable judge is able to communicate with the offices of trustee and fiduciary. The argument at this level is more difficult to sustain. Equity has traditionally treated these personae not in terms of the language of office but as individual conscience bearers. When a complainant in equity holds a trustee to account, for example, it is *in personam* and against the conscience of the defendant as opposed to *in officium*. It is here that the personal conscience of trustees seems more firmly rooted in medieval confessional practices aimed at the intercession and salvation of private individual souls from the strict letter of divine law (and from which practice, according to some accounts, certain ideas of equity’s spiritual jurisdiction over subjects emerge). The imposition of conscionable standards of action (synderesis in Christopher St Germain’s terminology) upon an individual trustee links that trustee to an external set of imperatives. In the medieval and renaissance scheme of things, interior conscience is linked to the moral rigour of religious codes. Or, put in reverse, an external moral code becomes internalised in the institution of religious subjectivity. What has changed in these theoretically secular times is the nature of those moral codes. Interior conscience is directed neither to religious mores nor to the normative codes of law. Individuated conscience nowadays

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<sup>36</sup> I am grateful to Riccardo Baldissone for his comments with regards to this. That the history of equity as an idea is a history of many different equities is a point that needs to be taken more seriously.

<sup>37</sup> Cyril Condren, 121; Conal??

is linked to the preservation of capital and the organization of the market. As such, the offices and institution of law have relinquished their jurisdiction over, and care of, legal subjectivity. In these terms, unconscionable conduct is that which threatens a moral code determined by property relations in the market. What is threatened by a trustee or fiduciary acting *mala fides* is not simply the specific set of relations (between the beneficiary and the defendant) but the structure and forms of behaviour upon which the capital economy survives. Conscience has to be deployed in order to protect parties from harsh market practices and in order to increase faith in the magic of the market. In this sense conscience is, or rather has become, a component of certainty holding together economic governance by ascribing conscionable conduct to those who hold certain types of position within the market.<sup>38</sup>

There is a further point here and it is one that needs as much emphasis and forceful expression as one can give. Conscience structures market fundamentalism and gives a certain form to a set of commercial practices in such a way that the market sector attains some kind of status as an institution. The market, as an institution, both mimics the idiomatic structure of law as an institution and rivals the institutional effects of law. Through the principle of conscience, and through the ordering of conscience based functions, the market institutes its own dogmatic foundation in the regulation of subjectivity. Modern equity links theologically derived notions of individual conscience (based upon the concept of *humanitas*) and fiduciary-ship to neo-liberal organization and capital management. These theological principles of conscience and faith sit somewhere within the interiority of the individual legal subject and link the interior dimensions of subjectivity not to the institution of law but to the financial churches. A fiduciary bound by the not for profit rule owes his or her *fides* not to the law, but to the accumulation or preservation of property and capital. Conscience, understood as an individual component, or a component of individuality, becomes a regulatory mechanism in the service of capital interest. In so doing, the market diminishes and replaces the institutional function of law.<sup>39</sup> The task of directing the principle of conscience away from its individuated application and towards its application to the field of public duty is also a task of returning to law a more institutionalised sense of itself and of its spirit in the form of equity.

**Piyel Haldar: please provide a short bio**

Piyel Haldar is ...

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<sup>38</sup> In a restricted sense the assimilation of conscience by neo-liberalism can be compared to the Sheldon Wolin's account of the historical shift from the language of conscience to that of self interest. See Sheldon Wolin, *Politics and Vision, Continuity and Innovation in Western Political Theory* (New Jersey: Princeton University Press, 2004).

<sup>39</sup> The literature both on the relationship between law and subjectivity and on its modern uncoupling under capitalist management is wide. For a general introduction see, Alan Supiot, *Homo Juridicus; On the Anthropological Function of Law* (London: Verso, 2007). For more detailed analysis see the collection of essays in Pierre Legendre, *Law and the Unconscious; a Pierre Legendre Reader*, eds. and trans. Peter Goodrich, Alain Pottage, Anton Schutz (London: Palgrave, 1997).